

The Equitable Life Assur. Socy. of the U. S. v Werner
2008 NY Slip Op 30628(U)
March 4, 2008
Supreme Court, New County
Docket Number: 0605092/1998
Judge: Herman Cahn
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

PART 49

P
 Index Number : 605092/1998
EQUITABLE LIFE ASSURANCE
 vs.
WERNER, ROGER D.
 SEQUENCE NUMBER : 006
 DISMISS COMPLAINT

INDEX NO. 605092/98
 MOTION DATE _____
 MOTION SEQ. NO. 6
 MOTION CAL. NO. _____

The following papers, numbered _____ s motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...
 Answering Affidavits -- Exhibits _____
 Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

FILED
 MAR 06 2008
 NEW YORK
 COUNTY CLERKS OFFICE

Dated: March 4, 2008 [Signature] J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X

THE EQUITABLE LIFE ASSURANCE SOCIETY OF
THE UNITED STATES,

Plaintiff,

Index No. 605092/98

-against-

ROGER D. WERNER,

Defendant.

-----X

ROGER D. WERNER,

Third-Party Plaintiff,

Third-Party
Index No. 590094/00

-against-

SHELDON MUHLBAUER, M.D.,

Third-Party Defendant.

FILED
MAR 06 2008
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HERMAN CAHN, J.:

Third-party defendant Sheldon Muhlbauer, M.D. (Dr. Muhlbauer) moves, pursuant to CPLR 3211 (a) (1), to dismiss the third-party complaint on the basis of a complete defense founded on documentary evidence.

This action arises out of a disability policy written by plaintiff The Equitable Life Assurance Society of the United States (The Equitable) for Dr. Muhlbauer, through a broker, defendant Roger D. Werner (Werner). A few months before applying for the policy in March 1988, Dr. Muhlbauer obtained another disability policy from Provident Life and Casualty

Company (Provident), also through Werner. The Equitable contends that it would not have written its policy had it known about the Provident policy, and seeks damages in the form of indemnity from Werner based on his supplying false information to The Equitable. Werner, in turn, seeks damages from Dr. Muhlbauer for any liability that he is found to have, based upon Dr. Muhlbauer having provided him with false information.

Dr. Muhlbauer asserts that Werner was aware of the Provident policy, as evidenced by a March 18, 1988 letter from Werner to Dr. Muhlbauer. That letter states:

Enclosed is a summary outline for your new disability income policy with Provident Life and Casualty Company. The policy provides a monthly benefit of \$11,000 after a 60 day elimination period. The policy was issued with a rider which allows a 7% increase in policy benefits. There is no cost for this benefit rider, however, you must pay for the additional coverage if you wish to avail yourself of it.

The original corrected policy is also enclosed. With regard to your application to Equitable, I'll let you know as soon as I have a response from them. Thank you once again for this opportunity to be of additional service to you.

Notice of Motion, Ex. 6.

On the application for the Equitable policy, dated March 8, 1988, Werner wrote that Dr. Muhlbauer had two disability policies from National of Vermont. *Verveniotis Affirm., Ex. D, at 2.* He did not list the Provident policy. *Id.* As the procuring broker, Werner knew that, in order to obtain the Provident policy, Provident had required Dr. Muhlbauer to cancel the National of Vermont policies.

DISCUSSION

Dr. Muhlbauer contends that the letter demonstrates that Werner knew about the Provident policy and that, therefore, any information that Werner failed to include in the

Equitable application was not due to Dr. Muhlbauer concealing that information from Werner. He maintains that Werner knew that he wanted additional coverage, not replacement coverage, because at the time that he applied for the insurance policies, he told Werner that he needed more coverage than that provided by one policy. Allegedly, Werner told him "I'll see what I can do." *Id.*, Ex. A, Muhlbauer Depo., at 21.

Werner maintains that he told Dr. Muhlbauer that he could not obtain two disability policies, and that Dr. Muhlbauer told him that the Provident policy was either already cancelled, or in the process of being cancelled. Therefore, Werner did not list it on the Equitable application. He contends that the two policies that he did list were listed at Dr. Muhlbauer's direction. Those policies were terminated before the Equitable application was submitted, as was required by the Provident policy. Dr. Muhlbauer asserts that he did not correct the Equitable application with respect to those two policies because he had not yet received the termination notices from them.

In order for a complaint to be dismissed based upon documentary evidence, the document must resolve all factual issues as a matter of law. *M. Fund, Inc. v Carter*, 31 AD3d 620 (2d Dept 2006). The March 18, 1988 letter establishes that Werner was aware of the Provident policy, which Werner acknowledges. Werner avers, however, that he believed Dr. Muhlbauer's alleged assertions that he was terminating the Provident policy, and the reason that Werner set forth the summary of the terms of the Provident policy in the March 18 letter was because he wanted to convince Dr. Muhlbauer that he should keep, or reinstate, the Provident policy.

Werner's explanation is not compelling. Werner's claim that he was merely trying to emphasize the benefits of the Provident policy in order to convince Dr. Muhlbauer to reconsider

his decision to cancel does not find support in the letter, as the letter contains absolutely no indication that Werner had such a concern. Further, the Equitable application asked for any other policies, not just those that would continue to be maintained. Werner obviously knew about the Provident policy and, in fact, provided a corrected policy to Dr. Muhlbauer after the date of the Equitable application. Thus, even accepting Werner's allegation that Dr. Muhlbauer misrepresented his intentions with respect to the Provident policy, it would not excuse Werner's failure to fill out the application accurately at the time that it was completed. If Werner provided a corrected policy on March 18, he could not reasonably have believed that the policy had been cancelled prior to March 8, when the application was completed. Thus, Werner's claims that Dr. Muhlbauer lied to him are irrelevant to this inquiry, and the letter utterly refutes Werner's contention that he did not know that he should include the Provident policy on the Equitable application because of misrepresentations made to him by Dr. Muhlbauer. *See Levenherz v Povinelli*, 14 AD3d 658 (2d Dept 2005).

It bears noting that, contrary to Werner's argument, this motion is not for summary judgment, but one for dismissal based upon documentary evidence. Therefore, the motion was not premature.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of third-party defendant is granted, and the third-party complaint is dismissed based upon documentary evidence with costs and disbursements to third-party defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 4, 2008

ENTER:



J.S.C.

FILED
MAR 06 2008
NEW YORK
COUNTY CLERK'S OFFICE